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No. 658

Supreme Court of the United States

OCTOBER TERM, 1934

MAX SENIOR,

Appellant,

v.

GEORGE C. BRADEN, ET AL.,

Appellees.

REPLY BRIEF FOR APPELLANT

I. THE DECISION OF THE OHIO SUPREME COURT DOES NOT PREVENT REVIEW BY THIS COURT OF THE FEDERAL QUESTIONS PRESENTED

The decision of the Ohio Supreme Court is conclusive that *Section 5323* in terms taxes equitable interests in real estate divided into shares evidenced by transferable certificates. But the question remains for this Court's decision: is the statute so taxing them constitutional?

If the Attorney General is correct in his contention that the decision of the Ohio Supreme Court is final as to the nature of the interest taxed and what is taxed, then he is

"hoist with his own petard"; because, in that view, *Section 5323* is an unconstitutional gross receipts tax. The second paragraph of the syllabus (which, as we have shown [Brief 20] is the law of the case in Ohio) reads (R. 169, top):

> "2. Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Section 5323, General Code (114 Ohio Laws, 715), does not provide for a tax against equitable interests in land but does provide a tax against the income derived from such equitable interests."

This makes *Section 5323* plainly unconstitutional as to appellant, for the following reasons:

1. It is an income tax on the entire income yield for the year, part of which was not received by appellant. *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206.

2. A tax against the income derived from equitable interests in land is, in substance, a tax on the equitable interests in land themselves, *Pollock* v. *Farmer's Loan & Trust Company*, 157 U. S. 429; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 16, and, therefore, subject to the constitutional infirmities we have pointed out on the assumption that the tax is on equitable interests in land, whether such land be located in or outside of Ohio.

In *Boettcher* v. *Boettcher*, 48 Oh. App. 319, 321 (7 Ohio Bar No. 44 (Advance Sheets, January 28, 1935), the same Court of Appeals which decided the case at bar, said:

> "We are of opinion that the law is well settled that a devise of the income from real estate during life is in effect a devise of a life estate in the realty. This in effect is holding in the case of *Isherwood* v. *Isherwood*, 16 C. C. 279, 8 C. D. 409, and cases therein cited. This rule is also pronounced in 28 Ruling Case Law, 239, and cases there cited, and in 40 Cyc. 1536. We know of no holding to the contrary."

8. It is not permissible to tax equitable interests in land divided into shares evidenced by transferable certificates on the basis of income yield in addition to full taxation of the legal title, and not to tax, except on the legal interest:

(a) Legal interests in land.

(b) Legal interests evidenced by transferable certificate but not divided into shares, e. g., registered titles and the Recorder's Certificate. (G. C. Ohio § 8572-23.)

(c) Legal interests divided into shares but not evidenced by transferable certificates.

(d) Equitable interests evidenced by transferable certificate but not divided into shares.

(e) Equitable interests divided into shares but not evidenced by transferable certificates.

It is apparent and does not require evidence to show that these various interests not taxed on income yield are substantially identical with the equitable interests taxed, according to the Ohio Supreme Court's decision, on income yield.

Hence, as before stated, if *Section 5323* is conclusively, because of the Ohio Supreme Court's decision, an income tax on income yield, it is unconstitutional. Appellees do not, anywhere in their brief, however, assert or try to establish that *Section 5323* is an income tax. Their whole brief is on the assumption it is a property tax. Thus, for example, point VIII of their brief (p. 50) is headed:

> "THE INTANGIBLE TAX LAW OF OHIO IMPOSES A TAX UPON THE EQUITABLE INTEREST OF THE APPELLANT IN THE SEVERAL TRUSTS UNDER CONSIDERATION HEREIN."

Again, as to the Ohio Supreme Court opinion, the first sentence of the second paragraph of the syllabus is to the effect that the holder of the land trust certificates named in the first paragraph of the syllabus is:

"the owner of equitable interests in real estate divided into shares evidenced by transferable certificates." (R. 169, top.)

No portion of the syllabus is more conclusive than any other; so we have a right to assert that the above quoted portion of the second paragraph of the syllabus conclusively establishes that the holder of the land trust certificates involved in this case is the owner of equitable interests in real estate. How can our opponents assert that the decision of the Ohio Supreme Court is conclusive as to the nature of the property sought to be taxed and yet dispute that portion of the opinion which says in terms the holder is the owner of equitable interests in real estate?

It is true the third point of the syllabus (R. 169) says the certificates represent intangible rights within the purview of *Section 5323* and are taxable as such; but the third paragraph is apparently inconsistent with the second paragraph and is entitled to no greater effect. Indeed, it should be regarded as less valuable, because the first sentence of the second point of the syllabus is supported and compelled by previous decisions of the Ohio Supreme Court as to the nature of equitable interests in real estate which opinions are not even mentioned by the Ohio Supreme Court in the case at bar, much less overruled. This Court may, then, itself determine the essential nature of certificates of equitable interests in real estate divided into shares evidenced by transferable certificates. It will also determine their *situs* for taxation. *Beidler* v. *South Carolina Tax Com.*, 282 U. S. 1.

II. THE LAND TRUST CERTIFICATES INVOLVED ARE MERE MUNIMENTS OF TITLE TO INTERESTS IN REAL ESTATE LOCATED IN OHIO, ILLINOIS, MASSACHUSETTS AND NEBRASKA

A. The taxing statute, Section 5323, denominates them "interests in land."

The brief of appellees erroneously states (pp. 2 bot.-3) that *Section 5323* defines investments

> "so as to include incorporeal rights of a pecuniary nature from which income is or may be derived, however evidenced, including equitable interests divided into shares evidenced by transferable certificates; . . ."

That this summary is wrong is shown by comparison with the actual reading of the statute in the note immediately following. The statute taxes

> "all contractual and other incorporeal rights, . . . excepting . . . (2) interests in lands and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates. . . ."

When the statute says "interests in lands" are excepted, save equitable interests divided into shares, etc., the exception to the exception must be of the same class as the exception. You cannot except something from something entirely different. It would not make sense to say:

> "All tangible property excepting intangible property shall be taxed."

Grammar and sense require the reading of *Section 5323* to be that equitable interests in land divided into shares evidenced by transferable certificates are interests in land.

These equitable interests are then certainly denominated interests in land by the statute and the designation of them as such in the taxing statute itself is entitled to very great weight. The statute in terms excepts all other interests in lands and rents and royalties derived therefrom, whether equitable or legal.

B. Ohio law has been, for almost a hundred years, definitely that equitable interests in land are real estate.

From cases cited in our brief (pp. 19-20) it is plain that equitable interests in land descend as real estate, are subject to sale for the payment of debts whenever legal interests in real estate are so subject and may be levied on by execution. By Ohio statute (*Section 11590*) also, a decree of court operates as a conveyance of defendant's title. Moreover, in Ohio, the contract purchaser of real estate, i. e., the equitable owner, is liable for loss of improvements on the property although the legal title is in the seller (Brief p. 18).

These decisions were urged on the Ohio Supreme Court, as were the opinions of the Attorney General and cases therein cited, referred to in our brief (pp. 15-17). As before stated, the Supreme Court did not refer to, much less attempt to distinguish or overrule any of these former decisions, and they must be regarded as still the law of Ohio. Our opponents dispose of this matter somewhat jauntily, as follows:

> "nor is the matter of descent involved herein. The issue is solely as to the nature of the interest of the beneficiary for purposes of taxation." (Their brief, p. 45.)

But the nature of the property is shown by the fact that it descends to the heir and has been treated as real estate for many years by Ohio decisions and officials.

III. APPELLANT BOUGHT, WHEN PURCHASING THESE LAND TRUST CERTIFICATES, INTERESTS IN REAL ESTATE

In the first place, his certificates and the declarations of trust therein referred to state, in substance, he was acquiring interests in real estate. The certificate for the Lincoln Inn Court ground rent (Exh. 1) recites that he

> "purchased and paid for an undivided interest in said premises" (R. 65, bot.)

and that he

> "is the owner of an undivided 340/1275ths interest in the premises described in said lease . . ." (R. 66, top) "and that at any time on demand The Title Guarantee & Trust Company will deliver special warranty deeds for undivided interests in said premises, . . ." (R. 66).

In the Declaration of Trust (Exh. 9) the Trustee agrees to convey to holders

> "by special warranty deed the proportionate part of the fee simple title to said property to which their certificates may entitle them" (R. 86).

As to the Illinois property, appellant's purchase is designated:

> "Land Trust Certificate of Equitable Ownership in the Clark-Randolph Building Site, located in Chicago, Illinois" (R. 67, bot.)

and certifies that appellant is registered as the owner of a fraction

> "of the equitable ownership and beneficial interest in certain property located at the northeast corner of Clark and Randolph Streets, Chicago, Illinois . . ." (R. 67 bot.-8.)

and that title is held by the Trustee for the benefit of holders of

> "Certificates issued or to be issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust" (R. 68).

The title certificate shows (R. 72):

> "at the date thereof, there are no conveyances, liens, judgments or pending suits of record . . . which affect the equitable interest evidenced by the land trust certificate."

followed by (R. 72):

> "Note: After a transfer of this Land Trust Certificate has been made, a new examination of the title will be made as of the date of recording such transfer and a new title certificate will be executed upon the new Land Trust Certificate, which will show the condition of the title as disclosed upon such examination.
>
> "Note: This transfer deals with an interest in Illinois real estate. If the holder hereof is married, the spouse should also execute and acknowledge this transfer . . ."

and by a form of conveyance showing the grantor is

> "owner of the entire beneficial interest represented by said Certificate in the premises described . . . to have and to hold the same unto the grantee forever; and the grantor covenants that he has not encumbered or permitted to be encumbered the undivided interest hereby transferred.
>
> "The undersigned, spouse of the grantor, for a valuable consideration hereby remises and releases to the grantee all right and expectancy of dower in said premises.
>
> "The undersigned hereby authorizes said Trustee . . . to have this conveyance recorded in the Recorder's Office . . ." (R. 73).

The form of conveyance and acknowledgment are similar to those used for deeds and the note following (R. 74) shows execution of the above instrument of transfer must be acknowledged before a Notary Public or other officer authorized to take acknowledgments of deeds.

In the Declaration of Trust (Exh. 10), Article II (R. 97), says:

> "The equitable ownership and beneficial interest in the Trust Estate is divided into three thousand two hundred and fifty (3,250) indivisible equal shares, (each share representing 1/3250th part of the equitable ownership of said trust estate)."

and that the certificates issued by the Trustee to Pohl evidence

> "the entire equitable ownership of said trust estate" (R. 97).

In Article VI the interest of the beneficiary is described as "being an equitable estate only" (R. 106).

From Article VIII we quote:

> "Land Trust Certificates and the equitable interest in the trust estate evidenced thereby may be transferred and conveyed in full shares, . . ." (R. 108)

and that the Trustee will file for record with the Recorder of Deeds of Cook County, Illinois, the writing evidencing each such transfer and will employ a title company to make a search of the court records of such county

> "and to report as to the existence of any liens, conveyances, encumbrances, judgments and/or pending suits of record (except taxes, assessments and existing liens) affecting the equitable interests so transferred, . . ." (R. 109).

Article XIV provides, in case of termination of the trust, other than by the exercise of the privilege of purchase

> "distribution shall be made by the Trustee in kind by conveyance of the Trust Estate in undivided legal interests, or, at the election of the Trustee, by sale and distribution of proceeds as in this Declaration provided" (R. 115-16).

The certificate of ownership of the Cleveland property (Exh. 7) is entitled:

> "Land Trust Certificate of Equitable Ownership in property located on East Sixth Street, Cleveland, Ohio . . ." (R. 75)

and certifies that:

> "Max Senior is the owner of six one-thousand-and-fiftieths (6/1050ths) of the equitable ownership and beneficial interest in certain property located," etc.

and that the certificate is:

> "issued by the Trustee to evidence ownership of said beneficial interest in said property so held by it in trust" (R. 75).

The form of assignment (R. 79-80) recites that the undersigned

> "being the owner of a portion of the beneficial interest in the premises described in said Agreement and Declaration of Trust, as evidenced by the within Certificate, does hereby for a valuable consideration sell and convey to . . ., his heirs and assigns forever, absolutely and in fee, the within Certificate and all interest therein and in said premises, . . ." (R. 80).

The form of acknowledgment is that used in Ohio for a deed (R. 80-1) and the note (R. 82) says that

> "it must be acknowledged before a Notary Public or other officer authorized by the laws of the State of Ohio to take acknowledgments of deeds, . . ." (R. 82).

The Declaration of Trust (Exh. 19) is with

> "The Holders of Land Trust Certificates of Equitable Ownership in Property Located on East Sixth Street, Cleveland, Ohio, etc." (R. 117).

Article I refers to "Certificates of Equitable Ownership" (R. 118, top).

Article II says "The equitable ownership and beneficial interest in the Trust Estate is divided into ten hundred and fifty (1050) indivisible equal shares" (R. 121).

Article XIII refers to:

> ". . . a new Land Trust Certificate or Certificates representing the number of shares of equitable ownership in the Trust Estate . . ."

When Mr. Senior bought his land trust certificates, the Attorney General of Ohio had rendered his opinion (Brief, 15) that such certificates represent interests in real estate; and that as to those outside of Ohio, the purchase was

> "a sale of foreign real estate . . ." (Brief, 17).

Section 710-140 (Brief, 49, bot.) designated these as

> "certificates of participation or beneficial ownership in improved lands . . ."

Mr. Senior, therefore, according to the certificates and declarations of trust he received and the statutes and rules of law in Ohio, acquired interests in real estate.

IV. THE OHIO SUPREME COURT IN ITS OPINION IN THE CASE AT BAR MISCONCEIVED THE NATURE OF EQUITABLE INTERESTS IN REAL ESTATE

As to the Lincoln Court Building certificate, appellant owns 340/1275ths or almost one-fourth of the total ownership and is entitled at any time on demand (R. 66) to a deed for his undivided interest in the premises, subject to the perpetual lease. This indicates strongly that his interest is very close to a legal interest in real estate subject to a perpetual lease. That he had not actually demanded a deed on tax listing day is not, as the Court argues to the contrary (R. 176), unimportant. Being entitled to a deed on demand shows the nature of his interest and that it is an interest in real estate.

The Court, however (R. 175), tries to make a point that he would get only a special warranty deed (R. 175, bot.) apparently unmindful of the fact that trustees' deeds are almost always of that character. Williams's, Real Property, 24 ed. (1926) 734; 65 C. J. "Trusts" 779, sec. 650.

The Court then argues (175, bot.-6) that if Senior got a deed all that he could get, having received a deed, would be money. We do not know how, in the absence of evidence on the subject, the Court undertakes to say (R. 176, top):

> "It never was intended by the creators of the trust that Senior should at any time have any of the land in question, and Senior never expected it."

The court is plainly wrong and unmindful of the statutes of Ohio relating to partition, when asserting that in the event of partition proceedings (R. 175, bot.):

> "An appraisement would be returned, property sold, and all that Senior could get would be 340/1275ths of the net selling price of the land in money."

On the contrary, *Section 12033*, Ohio General Code, provides for amicable partition and:

> "In such cases and in all cases where the lands are divided by the commissioners among the parties, the court shall order the sheriff to execute and deliver to each person entitled thereto a deed for the portion set off and assigned to such person."

and by *Section 12034*, when the estate cannot be divided without manifest injury to its value, the commissioners return that fact to the Court with a just valuation of the estate and

> "thereupon if the court approves of the return, and one or more of the parties elects to take the estate at such appraised value, it shall be adjudged to him or them, upon his or their paying to the other parties their proportion of its appraised value, according to their respective rights, or securing it. . . ."

By *Section 12037*, unless the Court, by special order, directs the entire payment to be made in cash, the purchase money is payable one-third on day of sale, one-third in a year and one-third in two years thereafter, with interest.

So that the Court's observations with respect to appellant's almost one-fourth ownership of the Lincoln Inn Court property and his right to a deed therefor at any time, that all he can get as a result is money, is clearly incorrect and it is not at all inconceivable that he might choose to get a deed, institute partition proceedings and acquire the remaining fraction at the appraised value.

Again, the Court is obviously wrong in saying that these land trust certificates are

> "tantamount to stock certificates in a corporation" (R. 179)

and that the plan is not carried out in corporate form as a subterfuge to escape taxation (R. 178, bot.-9). Here,

also, the Court is unmindful of Ohio statutory law existing at the time these equitable interests in real estate were sold. Until the Intangible Tax Law was passed in 1931 it was expressly provided by *Section 192* that a stockholder in an Ohio corporation was not required to pay taxes on his shares and that a stockholder in a foreign corporation was also not required to pay taxes if the corporation paid the same as the domestic franchise tax, as follows:

> "SEC. 192. (Listing of corporate stock for taxation.) No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation provided such corporation, for the privilege of exercising its franchise in Ohio, elects to pay and pays annually a franchise tax at the times, in the manner, on the basis and in the amount prescribed by law for domestic corporations."

Moreover, the differences between land trust certificates and shares of stock are so plain and have been pointed out so often that we shall not take space to refer to them.

The Court relies on *Maguire* v. *Trefry, Tax Commissioner*, 253 U. S. 12, 17, but that case is readily distinguishable since:

1. This Court was not dealing there with the right to tax securities which had acquired a local situs (p. 16);

2. The Massachusetts statute by its express terms (p. 13) exempted securities directly taxable to the trustee; and

3. The trust *res* was securities consisting of notes, stocks and bonds, etc. (p. 13), not, as here, real estate and the tax was an income tax.

It appears from the report of the case in 230 Mass. 503, both that the trust was of securities which had not acquired a local situs (p. 504) and that some of the securities

in the trust were taxed to the trustee in Pennsylvania and were, therefore, by the very terms of the statute not taxed in Massachusetts. The Massachusetts decision says (p. 513) the statute was passed in the interest of interstate comity and manifestly aimed to avoid duplicate taxation upon the same property in different states. In the case at bar, however, it is stipulated that the trust *res*, land, is taxed at its full value to the trustee, with no diminution for outstanding equitable interests (R. 59).

Finally, the Ohio Supreme Court cited well-known cases (p. 177 bot.-8) to the effect that land is not property, but the subject of property, and that the term property in its legal significance means only the rights of the owner in relation to it.

This is true of legal interests in land as well as of equitable interests. If property in land is to be taxed because it signifies rights in connection therewith, this would necessarily lead to the taxation of all property rights in land, legal or equitable. The only difference between legal and equitable interests in land is that, while both are rights in relation thereto, the former are worked out directly and the latter through the trustee. The beneficial enjoyment is the same.

The Ohio Supreme Court, in the present case, did not intend to hold that the making of a ninety-nine year lease, renewable forever, changed the nature of the interest held by the owner of the fee simple from real state to intangible personal property in the nature of a chose in action. Subsequent to the decision in the instant case, in *Tax Commission* v. *Jacobs*, 129 O. S. 216, decided on February 20, 1935 (advance sheets of the Ohio State Bar Association Report for February 25, 1935), the Court ruled:

> "For inheritance tax purposes an undivided one-half interest in fee simple estates subject to 99-year leases, renewable forever, should be appraised as real estate at its actual market value as of the time of

> accrual of the tax, as provided in Section 5341, General Code, and not by a capitalization of the annual rental income as prescribed in Section 5342, General Code."

If the right to receive rents in perpetuity had changed the character of the property from realty to personalty, then it would have been proper to capitalize the income, rather than to value the property as real estate, without regard to the capitalization of the annual rental income.

The privilege of purchase does not work an equitable conversion of the real estate into personalty until the privilege is exercised. *Smith, Admr.*, v. *Loewenstein*, 50 O. S. 346.

In *Dana* v. *Treasurer and Receiver General*, 227 Mass. 562, the Court said, with reference to the Duluth and Gladstone real estate trusts, *in which the decedent's equitable interest was held to be realty* (page 572):

> "It was provided that the real estate remaining unsold at the end of twenty years should be sold and the proceeds divided . . . But in such a case no conversion takes place until the date when the sale is directed to be made and at Mrs. Dana's death her interest as a holder of one undivided fourth of the land in Duluth was an interest in real estate outside the commonwealth and so not subject to a tax in Massachusetts."

In *Baker* v. *Commissioner of Corporations and Taxation*, 253 Mass. 130, Chief Justice Rugg speaking for the Court said (page 134):

> ". . . When a definite time is specified in an agreement between parties for the sale of real estate and its conversion into personalty, the conversion commonly does not take place until that specified time has arrived. . . ."

The provisions in the respective declarations of trust that certain acts may be done only with the written consent

of the owner or owners of three-fourths of the outstanding shares into which the real estate had been divided would not change in any way the nature of the certificate holder's property right. *Crocker* v. *Malley*, 249 U. S. 223, 233; *Williams* v. *Milton*, 215 Mass. 1, 10.

V. CASES CITED IN APPELLEES' BRIEF CONSIDERED

The cases that counsel for appellees cite, to support their statement that the combination of rights which the appellant possesses, constitutes his property right in the land trust certificate personalty, do not bear out this statement (brief of appellees, page 35). *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, merely held that a state has the right to impose an income tax on the net income of its own citizens derived wholly from activities carried on by them outside the state even though corporations are exempt from such taxes. There was no question of taxing income from land in that case. On the question of discrimination, the Court pointed out that the Federal Government had adopted different systems of taxation for corporations and individuals and that there was no reason why the state should not do the same.

Dana v. *Treasurer and Receiver General*, 227 Mass. 562, is an authority in our favor as the Court held that Massachusetts could not tax a trust consisting of foreign real estate (see pages 571, et seq.). *Priestley* v. *Treasurer and Receiver General*, 230 Mass. 452, is also an authority in our favor. See the opinion concerning the Warren Chambers trust beginning at the bottom of page 454. In *Estate of Stephenson*, 171 Wis. 452, beginning at page 460, it appears that the Isaac Stephenson Company Trustees was a trust created in 1912 by the stockholders of the I. Stephenson Company, a Michigan corporation, which had a capital stock of eight hundred thousand dollars divided into eighty

thousand shares of the par value of ten dollars each. In the trust the stockholders were called certificate holders, and held certificates of parts in number and par value equal to the number and par value of their shares of stock. (But, in the instant case the trust certificates have no par value.) Five trustees were created, and they were required to carry on the lumber operations and general business of the former corporation during the lives of two of the certificate holders or the survivor, unless sooner terminated by a two-thirds vote of the certificate holders, each part being entitled to one vote. The certificate holders also had the right to remove and appoint trustees as well as terminate the trust at any time. (None of these rights inheres in the land trust certificate holders in the instant case.) The trust property, at the time of Stephenson's death, consisted of both real estate and personal property, though chiefly real estate. It was provided that upon the termination of the trust the real estate should vest in the I. Stephenson Lumber Company, a Wisconsin corporation. There were provisions making the certificates assignable, not conveyable as a deed, and for descent to the executors, administrators or assigns of a deceased certificate holder. It is obvious that this was a business management trust. The Court, therefore, followed the decisions in the parts of the *Dana* and *Priestley* cases, cited *supra*, which referred to business trusts, and not the parts of those cases that referred to pure land trusts. The Wisconsin Court recognized that its decision was in conflict with *Bartlett* v. *Gill*, 221 Fed. 476. It did not refer to the affirmance of that case by the Circuit Court of Appeals for the First Circuit in *Gill* v. *Bartlett*, 224 Fed. 927.

We still assert, therefore, that there is no decided case, outside of the instant one, that has held that where only real estate was held in trust, on terms similar to the trusts in the instant case, that it may be taxed by a jurisdiction

other than that in which the land lies. Every case in which the question has squarely arisen, except the instant one, has denied the foreign state the right to tax the equitable interest in the land.

In 1 Cooley's Blackstone, 3rd Edition, Book II, page 336, *337, the Blackstone text says:

> ". . . the courts now consider the trust estate . . . as equivalent to the legal ownership, governed by the same rules of property and liable to every charge in equity, which the other is subject to in law . . . The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice; which, as *cestuy que use* is generally in possession of land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments . . . to forfeitures, to leases and other incumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower more from a cautious adherence to some hasty precedents than from any well grounded principle . . ."

In the instruments being considered in the present case, the trustee cannot convey to a purchaser without notice and defeat the equitable title, because the Declarations of Trust are recorded.

Speaking of the Statute of Uses, the same learned author says at page 330, Book II, Chapter 20, *333, that it

> "executes the use . . . ; that is, it conveys possession to the use and transfers the use into possession; thereby making *cestuy que use* the complete owner of the lands and tenements, as well at law as in equity.
>
> "The statute . . . turned the interest of a *cestuy que use* into a legal instead of an equitable ownership."

The Statute of Uses is in effect in Illinois.

Cahill Ill. Revised Statutes 1931, Chapter 30, Section 3, provides as follows:

Conveyance to use—Title vests in beneficiary.

"Sec. 3. Where any person or persons stand or be seized, or at any time hereafter shall stand or be seized of and in any . . . lands . . . rents . . . or other hereditaments to the use . . . or trust of any other person or persons or of any body politic by reason of any . . . agreement . . . or otherwise, by any manner or means whatsoever, in every such case all and every such person or persons and bodies politics that have or hereafter shall have any such use . . . or trust, in fee simple . . . shall from thenceforth stand and be seized, deemed and adjudged in lawful seizen, estate and possession of and in the same . . . lands . . . rents . . . and hereditaments, with their appurtenances, to all intents, constructions and purposes in law of and in such like estates, as they had or shall have in use . . . or trust of or in the same; and that the estate, right, title and possession that was or shall be in such person or persons that were or hereafter shall be seized of any lands . . . or hereditaments, to the use . . . or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him, her or them that have or hereafter shall have such use . . . or trust . . ."

It is stipulated (R. 183, bot.-4) that the decision of this Court with respect to the Illinois land trust (Ex. 2, R. 67) should be applied to the other certificates of equitable ownership in real estate outside of Ohio.

As before stated, the certificate shows in terms (R. 72):

"it deals with an interest in Illinois real estate."

The brief concedes (p. 20):

"that under the Fourteenth Amendment to the Constitution of the United States, the state of Ohio has no power to tax land or interests in land situate beyond

its borders; nor has it power to tax land or interests in land situate within the state in any other manner than by uniform rule according to value, under Article XII, Section 2, of the Constitution of Ohio. From this it follows as a matter of course that if the property of the appellant which the appellees seek to tax in this case is land or an interest in land, situate within or without the state, their action is unconstitutional and should be permanently enjoined."

As shown in our main brief (pp. 21-23), this Court decided in *Brown* v. *Fletcher*, 235 U. S. 589, that an equitable interest in a trust estate *is property of the same nature as the property held by the trustee*, and not a mere chose in action. Counsel for appellees attempt to distinguish that case (brief, p. 42) by saying that the trust had terminated at the time the suit was brought and the beneficiary was, therefore, entitled to possession. This claimed "distinction" is, however, untenable, and the Court's ruling did not take it into account. The assignments of the equitable interest were made in 1901 and 1902 *when the beneficiary was entitled to income only.* He was not entitled to the principal until 1913. The Court was, therefore, construing the nature of the *cestui que trust's* right *at the time of the assignments*, over ten years before his right to possession accrued.

The appellant's rights in the trusts are the same as those of the assignor in *Brown* v. *Fletcher*.

Counsel criticize unfavorably our selection of text, treatise and law review articles on the nature of the interest of the *cestui que trust* (brief, p. 43), and then proceed to cite, as a persuasive text writer, *Hohfeld, Fundamental Legal Conceptions*, 1923, especially page 96 (brief, p. 47). Pursuing the subject in Hohfeld ten pages further (p. 106), the author disapproves of the reasoning of those who hold the view that because the remedy is *in personam*,

therefore the right is only *in personam*. He then points out the numerous rights that an equitable owner has that are of the nature of rights *in rem*, if the trust *res* is land.

In *Eaton* v. *B. C. & M. R. R. Co.*, 51 N. H. 504, cited appellees' brief, page 46, the question was whether land owners could hold a railroad liable for cutting away a ridge, not on their land, which formed a barrier protecting their lands against the waters of the river in the times of floods and freshets. The railroad defended on the ground that it complied with the law and acted in a careful manner. The Court held that the railroad was liable for the damage to the continued use of the land in its natural state, irrespective of whether it was negligent or not. It was in this connection that Judge Jeremiah Smith made the statements quoted in appellees' brief.

A natural corollary of the right to use property, which is one of the rights of possession, is the right to let others use it. One does not part with property in a chattel when one loans it to another. No more does one part with property and real estate when one leases it to another. Without the right to possession and use a lease would not be possible. To refrain from using one's property or to permit another to use it, on agreed terms, is as much an attribute of property, as to use it oneself. Appellees argue that since appellant could not use the Clark-Randolph land and building on January 1, 1932, this is proof that his rights were exclusively personal. But in the case of any real estate which is subject to a long term lease with privilege of purchase, the owner of the fee simple title, so long as the lessee is not in default, has no right to use the land or building so leased, but only the right to receive the rentals called for by the lease. The argument of counsel for appellees, if carried to its logical conclusion, would mean that the owner of any ground rent was not the owner of real estate, but an owner of what opposing counsel are pleased to call

"congeries of rights" and "bundles of equitable choses in action."

It is difficult to see what logic there is in saying that one parts with one's property by placing it in trust, retaining all the beneficial fruits of ownership. Suppose appellant had owned outright all of the properties in question. If he had made the leases himself he would not have parted with the property, though he parted with the present use in return for a fixed annual income. If he had put his property in the hands of an agent for management, he would still be the legal owner. Where, then, is the essential difference if he calls the agent a "trustee" and makes the "agency" irrevocable so long as the "agent" acts faithfully in accordance with the terms of the agreement? Since "taxes must follow realities" (*Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 286, quoted in appellees' brief, page 38), this is the reality, and it is the appellees who are grasping at shadows.

Counsel for appellees (brief, p. 45) attack the Restatement of the Law of Trusts as merely stating the views of Professor Scott and his associate reporters. The Draft Restatement quoted in our main brief (p. 31) was first promulgated in 1930 and has not been changed. We now have the "Proposed Final Draft" for the approaching meeting and Section 126 remains unchanged. It is in accordance with all the decided cases in the United States to date, except the instant one in the Supreme Court of Ohio. The Restatement by the American Law Institute is supposed to be authoritative. It will not accomplish its purpose and rescue the courts and the practicing lawyer from the welter of conflicting decisions if it is rejected, *in limine*, though supported by the overwhelming weight of authority.

Counsel for appellees (brief, p. 45) cite as against the Draft Restatement of the Law of Trusts by the American Law Institute the testimony of Professor Richard Powell

of Columbia University Law School in *Archer-Shee* v. *Garland* (1931), A. C. 212, 218. Professor Powell was testifying in that case only as to the law of New York State, which is not involved in this case. The report does not show that he cited any court decisions, text writers or other authorities for his statement. The House of Lords felt constrained to follow his opinion regarding the nature of the equitable right in a New York trust, because no testimony was offered to the contrary.

The opinion given by him was, however, directly contrary to the English law laid down by the House of Lords only four years before in *Baker* v. *Archer-Shee* (1927), A. C. 844. In that case the attempt was to tax Sir Archer-Shee for the income of his wife from a trust left in the will of her father, Mr. Alfred Pell, of New York. He had created a trust with a trust company in New York. The net income from the trust was deposited by the trustee to Lady Archer-Shee's account with J. P. Morgan & Company and it was never remitted to England. The law of England at that time was such that if the income was construed as arising from the specific investments which constituted the trust fund, it would be taxable, whether remitted to England or not, but if it was not from the specific investments, then it would not be taxable. This raised directly the question whether Lady Archer-Shee's equitable life interest in the trust was an interest in the securities held by the trustee, or was merely a right against the trustee in the nature of a chose in action such as counsel for appellees claim appellant has here. The House of Lords rejected the latter contention. Lord Carson stated the opinion of a majority most succinctly on page 870, saying:

> "In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the respondent's wife was sole beneficial owner of the interests and dividends of all the securi-

> ties, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends."

Lord Tomlin in the later 1931 case, also pointed out (p. 222 bot.) what amounts to a clear difference between the trust there considered and the trusts in the case at bar. In the *Archer-Shee* case the trustee could apply the income of the property for the benefit of the *cestui* in its reasonable discretion instead of paying it over to her. In the trusts involved in our case, the trustee has no discretion at all and must pay over the rentals to the persons entitled thereto. It is immaterial that the trustee first takes out its charges. That is a matter of convenience, only, and the charges might have been collected instead from the beneficiaries after the rentals were remitted in full. Also, one property, land only is involved in each trust; not, as in the *Archer-Shee* case, a number of securities.

In *Burgess* v. *Wheate*, 1 Eden 177 (1759), Lord Mansfield said (pp. 223 and 224):

> "The *forum* where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered as between *cestuy que trust* and trustee (and all claiming by, through or under them, or in consequence of their estates), as the ownership or legal estate, except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate.
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> . . . . . .
>
> "Twenty years ago I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by imitation. Every thing I have heard, read, or thought of since, has confirmed that principle in my mind."

In *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, at page 93, the Court said:

> "Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State. We think not. The reasons which led this Court in *Union Refrig. Transit Co.* v. *Kentucky*, 199 U. S. 194, and *Frick* v. *Pennsylvania*, 268 U. S. 473, to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive. And the fiction of *mobilia sequuntur personam* 'was intended for convenience, and not to be controlling where justice does not demand it.' "

Moreover, in the attempted taxation on both the Ohio and foreign land trust certificates, the appellant is denied the equal protection of the laws. Counsel for appellees (brief, p. 58) say that there are neither allegations in the petition nor evidence to lay the foundation of fact to show this. As to the petition, we call attention to the following language (R. 44-45):

> "Plaintiff says that General Code of Ohio, Section 5323, purports to except from taxation as investments 'interests in land and rent and royalties derived therefrom other than equitable interests divided into shares evidenced by transferable certificates,' that is, said section purports to except from taxation as investments interests in land, legal and equitable, rents derived therefrom when not evidenced by transferable certificates, but does not except from taxation as investments equitable interests in land and rents derived therefrom when evidenced by transferable certificates.

"Plaintiff says that the assessing and collecting of taxes on plaintiff's said equitable interests in land evidenced by transferable certificates, when all other equitable interests in land not so evidenced are exempted therefrom, is an arbitrary and unreasonable discrimination without warrant of law, and amounts to a taking of private property without due process of law, and denies to plaintiff, a citizen of the United States, the equal protection of the law, in violation of plaintiff's rights under the Constitution of the United States and of Article XIV, Section 1 of the amendments thereto."

As to the factual presentation, none was necessary, since the discrimination appears on the face of the statute itself. No equitable interests in land, however arising or of whatever nature, are taxed except those "divided into shares evidenced by transferable certificates" (G. C. Ohio § 5323, main brief, page 50). If the legal interests were divided into shares and a single transferable certificate issued for each legal interest (e. g., by taking smaller pieces of property as units) then there would be no tax. If the equitable interests were divided into shares, no matter how minute and no matter in what manner, so long as they were not "evidenced by transferable certificates," there would be no tax. The beneficial interests might be exactly the same and the rights of the equitable owners exactly the same, but the tax is imposed by Ohio where a certificate is issued and is not imposed where a certificate is not issued. This Court does not need evidence to show that that is arbitrary discrimination. It is perfectly evident that the Ohio Legislature has recognized either that it cannot or it should not tax equitable interests, because the land itself has already borne its full share of taxes, but has tried to single out, not one type of equitable interest but a part of that type which is evidenced in a particular way.

The cases cited in our main brief show that in some trusts certificates are issued and in some they are not. No attempt is made by appellees to answer the argument made in our main brief that the tax is virtually a tax on the *evidence* of certain kinds of equitable interests in real estate, since such interests where not evidenced by so-called "transferable certificates" are admittedly not subject to tax. Indeed, in one of the cases relied upon by opposing counsel, *Kirtland* v. *Hotchkiss*, 100 U. S. 491, quoted in their brief (p. 17), this Court distinguished between a property right and the evidence of such right. Our Ohio courts have likewise held that a state has no right to tax evidence of an interest in property apart from the property itself. (See our main brief, pages 36 and 37.)

In *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, this Court said at page 160:

> "With all this freedom of action, there is a point beyond which the State can not go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced, shall be treated alike.'. *Royster Guano Company* v. *Virginia*, 253 U. S. 412, 415; *Louisville Gas Company* v. *Coleman*, 277 U. S. 32, 37; *Air-Way Corporation* v. *Day*, 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240."

In *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, in holding invalid a recording tax which taxed only mortgages not maturing within five years, this Court said, at page 37:

". . . *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin* v. *District of Columbia*, 205 U. S. 135, 139; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237."

The decision of this Court in *Stewart Dry Goods Co.* v. *Louis*, handed down March 11, 1935, is helpful of the problems in this case in more than one particular. The Court cites *United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328, as follows:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental."

In the instant case it should be noted that the tax is closer to a gross receipts tax than to a net income tax. The tax in the instant case purports to be and is a tax on property, merely using the "income yield" as a basis for measurement.

In the *Stewart Dry Goods Co.* case, *supra*, this Court said:

"The operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land, similarly graduated according to the number of parcels owned."

What is the difference between graduating a tax according to the parcels owned and taxing some real estate twice because a paper has been issued to evidence an equitable interest, while another piece of real estate on which exactly the same equitable interest has been raised is not taxed because the evidentiary piece of paper is not issued?

CONCLUSION

Irrespective of the nature of the property, it may not be taxed except at its *situs*. The *situs* of real property held in trust is where the property is located.

The interposition of a trustee between the owner of the land and the leasehold tenant does not create a new property right, but merely a division of the entire property. No one would question the unconstitutionality of an act attempting to tax the legal life interest of a beneficiary in real estate, if the real estate had already been taxed at its full value. It is equally unjust to tax the equitable owner, who has the complete beneficial interest, when the real estate has already paid the full tax. The trustee holds title solely for the equitable owner. When the trustee or the lessee with whom he has contracted has paid the tax on the real estate, the tax has been paid on the whole beneficial interest. This is the reality. There is no new economic entity created which should bear an additional tax burden.

The judgment of the Ohio Supreme Court should, therefore, be reversed.

Respectfully submitted,

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